10-2-2014

State v. Rose Appellant's Brief Dckt. 41412

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. SANJA ROSE AKA TUCAKOVIC, Defendant-Appellant.	NO. 41412 ADA COUNTY NO. CR 2012-12226 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Sanja Rose appeals from her judgment of conviction for trafficking in heroin. She pleaded guilty, and the district court imposed a unified sentence of seven years, with three years fixed. Ms. Rose subsequently filed a motion to withdraw her guilty plea, which was denied. Ms. Rose now appeals, and she asserts that the district court erred by denying her motion to withdraw her guilty plea.

Statement of the Facts and Course of Proceedings

Ms. Rose was charged by indictment with aiding and abetting the trafficking in heroin, I.C. §§ 37-2732B(a)(6); 18-204. (R., p.6.) This crime carries a mandatory minimum of three years fixed. I.C. § 37-2732B(a)(6)(A).

Ms. Rose pleaded guilty and the State agreed to dismiss charges in a separate case. (R., p.48.) While Ms. Rose was warned of the mandatory minimum when she entered her plea, at sentencing, counsel argued that the mandatory minimum did not have to be served in the custody of the state board of correction. (8/2/13 Tr., p.38, Ls.3-6.) Counsel asserted that, because I.C. § 37-2739A (another statute governing mandatory minimums), specified that sentences imposed pursuant to that statute be served in the "custody of the state board of correction" and I.C. § 37-2732B(a)(6)(A) stated only that the term be fixed, the court had discretion to place Ms. Rose on probation. (8/2/13 Tr., p.36, L.1 – p.38, L.6.) As a result, counsel asserted that Ms. Rose was a candidate for intensive, long-term treatment. (8/2/13 Tr., p.35, Ls.14-19.) Specifically, counsel argued:

> What I was going to recommend, and pursuant to the negotiations with the State is that I would respectfully respond to that question [what authority

> the court had to not execute her sentence] by saying that you could sentence her to a period of three years fixed, two indeterminate would be my recommendation for an aggregate sentence of five years, with the defendant being placed on five years supervised probation with the special condition that she successfully complete three years of inpatient treatment at a secure facility.

(8/2/13 Tr., p.39, Ls.7-18.) The district court rejected this argument, holding that it lacked jurisdiction to sentence Ms. Rose to anything less than the mandatory minimum of three years fixed. (8/2/13 Tr., p.44, Ls.15-25.) The court then imposed a unified sentence of seven years, with three years fixed. (R., p.63.) Ms. Rose timely appealed. (R., p.74.)

Ms. Rose, through new counsel, subsequently filed a motion to withdraw her plea. (R., p.84.) She asserted that, while she knew that there was a three-year mandatory minimum, she believed that she could still be placed on probation. (R., p.87.) She also asserted that her prior attorney told her that she was likely going to get a rider, with 8 to 11 months of prison time, and that she could be placed on probation if she performed well on the rider. (R., p.87.) At no point did she believe that the mandatory minimum required her to serve three years in prison. (R., p.87.)

The court held an evidentiary hearing on the motion. Ms. Rose testified that her prior counsel told her that she would likely get probation or drug court. (1/17/14 Tr., p.15, Ls.17-20.) After she was informed of the mandatory minimum when she pled, she had subsequent discussions with her attorney, and,

> In my understanding I thought that Judge Hansen would have retained jurisdiction still over me, and we talked a lot about me getting a rider possibly. At worst case scenario he said TC or something like that, and the Matter, Inc. program we looked into which was an inpatient treatment, rehab.

> But I thought that Judge Hansen would still have retained jurisdiction over me. And then if I were to mess up or use or something like that, then in that case I would face more severe consequences.

(1/17/14 Tr., p.16, Ls.5-16.) She believed she still had an opportunity at probation. (1/17/14 Tr., p.16, Ls.17-19.) On cross-examination, Ms. Rose acknowledged that she had been informed several times that there was a mandatory minimum, but still asserted that she believed that the court could still retain jurisdiction or order TC or drug court. (1/17/14 Tr., p.27, Ls.2-8.)

Ms. Rose's prior attorney also testified at the hearing. He stated that he told Ms. Rose that the judge did not have discretion with the mandatory minimum. (1/17/14 Tr., p.58, Ls.12-21.) Later, when they discussed the mandatory minimum, Ms. Rose "begged" him for anything he could do, and he "came up with the most creative argument that [he] could." (1/17/14 Tr., p.65, Ls.8-13.) He eventually told her that this argument was "an extreme long shot, basically a Hail Mary. We talked about what a Hail Mary is. I remember that because she didn't understand the reference." (1/17/14 Tr., p.66, Ls.6-9.) Counsel explained: "A Hail Mary is a pass that is thrown at the end of the game when you feel like you have nothing to lose. Basically the game is over and there is one in a billion chance that you can do something to overcome the odds and prevail." (1/17/14 Tr., p.66, Ls.12-17.)

On cross-examination counsel testified that he told Ms. Rose that there was no opportunity for probation or a rider, but still acknowledged that he informed her of his "Hail Mary" argument. (1/17/14 Tr., p.70, Ls.1-23.) Counsel acknowledged that "Hail Mary" can be successful, but he stated that he did not phrase this in terms of anything that had a likelihood of success. (1/17/14 Tr., p.71, Ls.6-10.)

The district court denied the motion. (Memorandum and Order Concerning Defendant's Motion to Withdraw Guilty Plea.)[1] Ms. Rose asserts that the district court abused its discretion by denying the motion to withdraw her plea.

[1] This order was received by this Court on May 5, 2014.

ISSUE

Did the district court abuse its discretion when it denied Ms. Rose's motion to withdraw her plea?

ARGUMENT

The District Court Abused Its Discretion When It Denied Ms. Rose's Motion To Withdraw Her Plea

A. Introduction

Ms. Rose asserts that the district court abused its discretion when it denied her motions to withdraw her plea because she demonstrated manifest injustice. Specifically, she asserts that she pleaded guilty under the false impression that she could avoid the mandatory minimum of three years fixed.

B. Standard Of Review And Applicable Laws

The decision whether to grant or deny a motion to withdraw a guilty plea lies in the discretion of the trial court. *State v. Freeman,* 110 Idaho 117 (Ct. App. 1986). Appellate review of the denial of a motion to withdraw a plea is, therefore, limited to whether the district court abused its discretion. *Id.* When evaluating a claim that the trial court has abused its discretion, the sequence of inquiry is: first, whether the district court correctly perceived the issue as one of discretion; second, whether the district court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and finally, whether the district court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). If the plea is legally defective, relief must be granted. Conversely, if the plea has been made knowingly, intelligently and voluntarily, it usually cannot be withdrawn after sentencing. *State v. Simons,* 112 Idaho 254, 731 P.2d 797 (Ct. App. 1987).

Pursuant to I.C.R. 33(c), a plea may be withdrawn after sentencing only to correct a manifest injustice. The defendant has the burden of demonstrating this

manifest injustice. *See State v. Henderson,* 113 Idaho 411 (Ct. App. 1987). An abridgement of a constitutional right is deemed a manifest injustice as a matter of law. *Id.*

A reviewing court determines whether a guilty plea is entered voluntarily and knowingly through a three-part inquiry involving:

> (1) whether the defendant's plea was voluntary in the sense that he understood the nature of the charges and was not coerced; (2) whether the defendant knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to refrain from incriminating himself; and (3) whether the defendant understood the consequences of pleading guilty.

State v. Dopp, 124 Idaho 481, 484 (1993). Ms. Rose asserts that the district court erred because she did not fully understand the consequences of pleading guilty.

C. The District Court Abused Its Discretion When It Denied Ms. Rose's Motion To Withdraw Her Plea

The district court made the following factual findings in its order denying Ms. Rose's motion:

> At the evidentiary hearing Ms. Rose testified in summary fashion that her attorney told her that she might get probation or a retained jurisdiction.
>
> The state introduced transcripts of arraignment and plea hearings at which Ms. Rose was advised by various judges on numerous occasions that the trafficking charge against her carried with it a mandatory minimum sentence of three years fixed and that the sentence could be extended to life. No judge or anyone else in court ever suggested to her that she would receive probation, drug court, or a retained jurisdiction.
>
> Mr. Fox testified that he tried without success to get the prosecutor to reduce the charge to a crime that did not have a mandatory minimum. He was only able to obtain dismissal of other drug-delivery felonies and a recommendation of a sentence of three years fixed and five years indeterminate. He told Ms. Rose in no uncertain terms that the chance of getting probation, drug court, or a retained jurisdiction was virtually nil. Nevertheless, he did tell her that he would try a "Hail Mary" type of argument to convince the judge that Ms. Rose should receive something

> other than the fixed mandatory minimum. At the sentencing hearing Mr. Fox argued strenuously but unavailingly against imposition of a fixed minimum sentence. Judge Hansen imposed a sentence of three years fixed and four years indeterminate.

(Memorandum and Order Concerning Defendant's Motion to Withdraw Guilty Plea, pp.2-3.) The court concluded that Ms. Rose's claim that she did not know that he would have received a fixed term of at least three years "flies in the face of reality." (Memorandum and Order Concerning Defendant's Motion to Withdraw Guilty Plea, p.3.) Thus, the court concluded that Ms. Rose's plea was entering knowingly, voluntarily, and intelligently. (Memorandum and Order Concerning Defendant's Motion to Withdraw Guilty Plea, p.3.)

Ms. Rose respectfully submits that the district court abused its discretion by denying her guilty plea. Specifically, she asserts that the court failed to reach its decision through an exercise of reason. Ms. Rose does not dispute, as found by the district court, that the judge informed Ms. Rose that she faced a mandatory minimum of three years fixed. This, however, does not end the analysis, because, as the district court also found, counsel informed Ms. Rose that he had come up with a "Hail Mary" argument to attempt to avoid the mandatory minimum. Thus, counsel was informing Ms. Rose that the court might be *wrong* when it informed her that she would face the mandatory minimum of three years fixed. A "Hail Mary," by definition, has a chance of success, as counsel acknowledged. (1/17/14 Tr., p.71, Ls.6-7.) Thus, the record shows that, regardless of the advice given to Ms. Rose by the court, her attorney informed her that he had an argument that the mandatory minimum could be avoided. And counsel, in fact, made this argument at the sentencing hearing.

Thus, Ms. Rose's assertions that she believed that she could still receive a retained jurisdiction or program were reasonable. Her attorney argued to the court that this was a possibility. Her attorney admitted that he told her he would make this "Hail Mary" argument. However, the proper legal advice would have been that there was absolutely no way to avoid the mandatory minimum. The "Hail Mary" argument was completely frivolous and should have been made to the court or discussed with Ms. Rose.

The fact that Ms. Rose had previously been warned that she faced the mandatory minimum is of little significance when the evidence at the hearing established that her attorney told her that he would make an argument that could avoid it. Counsel told Ms. Rose that it was at least a possibility that the mandatory minimum could be avoided and counsel made this argument to the court at sentencing. Thus, the record establishes that Ms. Rose believed that she had at least some chance of avoiding three years fixed. Therefore, her plea was not knowingly, intelligently and voluntarily given. As a result, the district court therefore abused its discretion by denying her motion to withdraw that plea.

CONCLUSION

Ms. Rose respectfully requests that the district court's order denying her motion to withdraw her plea be reversed and her case remanded for further proceedings.

DATED this 2nd day of October, 2014.

JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of October, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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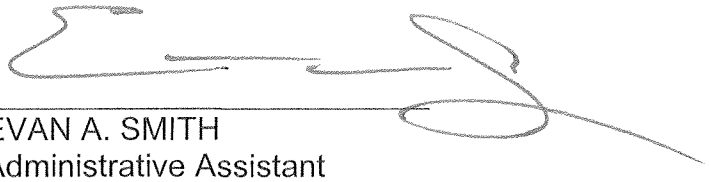

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